JUDGE ROBERT E. THOMAS

DEPT. C67
CENTRAL JUSTICE CENTER ANNEX
909 N. M AIN ST.
SANTA ANA

The Court will make a reasonable effort to post Tentative Rulings on the Internet on Law & Motion matters Monday through Thursday. The hearings are scheduled for Fridays at 1:30 pm. The Internet address is www.oc.ca.gov/superior/civiltd.htm. The clerk will also make an effort to fax the rulings to the moving parties.

Counsel are to check the comments after the case name on the Rulings/Tentative Rulings for indication on whether oral argument is prohibited, discouraged, tolerated, or otherwise invited. Oral argument, which is ordinarily permitted, will be heard at the time noticed for the hearing. If counsel do not wish to submit on the Tentative, please call the clerks at 714) 569-2318.

LAW & MOTION 9-29-00

 # 1 FOUNTAINS SENIOR PROPERTIES V BIRTCHER

[This is a ruling. Moving party to give of ruling and that no appearances are to be made]

MOTION: DEMURRER — OVERRULED, 20 DAYS TO ANSWER

474 AMENDMENT:

WHILE IT MAY BE THAT THE PLAINTIFF KNEW OF BOTH THE IDENTITY AND THE FACTS GIVING RISE TO THE CAUSES OF ACTION ASSERTED, A DEMURRER IS THE WRONG VEHICLE TO ASSERT THE CHALLENGE THAT THE AMENDMENT WAS IN VIOLATION OF CCP 474. DEFENDANT HAS CITED NO AUTHORITY THAT THIS ISSUE CAN BE RAISED BY DEMURRER, AND THE FACE OF THE PLEADING, TOGETHER WITH THE DOCUMENTS TO BE JUDICIALLY NOTICE, DO NO ESTABLISH

CONCLUSIVELY THAT THE AMENDMENT WAS IMPROPER.

DEFENDANT HAS CITED CCP 430.30 AS THE AUTHORITY FOR THE DEMURRER [THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION]. BUT THE FOURTH AMENDED COMPLAINT DOES STATE A CAUSE OF ACTION AGAINST EMERITUS. NOTE THAT THE CASES CITED BY THE PARTIES WERE BROUGHT UP BY WAY OF MOTIONS TO STRIKE, TO QUASH OR FOR SUMMARY JUDGMENT, NOT DEMURRER.

FAILURE TO STATE A CAUSE OF ACTION:l

DEFENDANT ARGUES THAT PLAINTIFF CANNOT, AS A MATTER OF LAW, ASSERT A CAUSE OF ACTION FOR STRICT LIABILITY AGAINST EMERITUS AS IT IS A COMMERCIAL PLAINTIFF. THAT IGNORES THE FACT THAT THE FOURTH AMENDED COMPLAINT ALLEGES ASSIGNMENT OF RIGHTS WHICH GIVES PLAINTIFF THE RIGHT TO SUE FOR STRICT LIABILITY. A GOOD CAUSE OF ACTION IS STATED.

DEMURRER FOR UNCERTAINTY:

DEFENDANT HAS FAILED TO CITE THE EXACT PORTIONS OF THE FOURTH AMENDED COMPLAINT WHICH IT CONTENDS ARE UNCERTAIN AND THUS THE DEMURRER IS PROCEDURALLY DEFECTIVE. DEFENDANT CONTENDS THAT THE PLEADINGS FAILS TO STATE WHICH PARTY IS ALLEGING THE CAUSE OF ACTION AND WHETHER PLAINTIFF IS BRINGING THE VARIOUS CAUSES OF ACTION AS AN ASSIGNEE OR AS A REAL PARTY IN INTEREST OR BOTH. THIS IS A MATTER WHICH CAN EASILY BE TAKEN CARE OF THROUGH DISCOVERY AND NEED NOT BE THE SUBJECT OF A FURTHER AMENDED PLEADING.

4 WOOSLEY V BUSHNELL

[Appearances and argument expected]

MOTION: TO VACATE ORDER DENYING — QUESTIONS FOR COUNSEL
      LIFTING OF DISCOVERY STAY

MOTION: FOR JOINDER — GRANTED

1. DOES R/P DISAGREE THAT M/P REQUESTED RELIEF FROM THE DISCOVERY
   STAY DURING THE TELEPHONE STATUS CONFERENCE ON 11-2-99 ?

2. DOES R/P CONTEND THAT THE DENIAL OF THE REQUEST IN # 1 BASED ON CCP
   425.16 ?

3. DOES M/P CONTEND THAT THE CCP 473 RELIEF SOUGHT IS NOT FROM A DETERMINATION ON THE MERITS ?

4. CAN CCP 473 PROVIDE FOR DISCRETIONARY RELIEF UNDER THE FACTS OF THIS CASE ?   SEE BOCHTRUP V INTEP (1987) 190 CA 3RD 323, 328.

5. WHY SHOULD THE DATE OF 12-23-99 BE THE CUTOFF ON TIMELY APPLICATION OF CCP 473 ?

6. WAS THERE A DISCOVERY STAY IN PLACE IN THE GARCIA CASE ?

MOTION: FOR NEW TRIAL — QUESTIONS FOR COUNSEL

1. DOES CCP 425.16 SPECIFICALLY EXCLUDE A MOTION FOR NEW TRIAL ?

2. WAS THERE A DETERMINATION OF FACT MADE UPON THE GRANTING OF THE THE CCP 425.16 MOTION ?

3. DOES CCP 659 (a) PROVIDE FOR A TIME LINE BASED ON "BEFORE THE ENTRY OF JUDGMENT "?

4. ARE THE ISSUES IN THIS CASE THE SAME AS THOSE IN THE SARET-COOK UNDERLYING ACTION ?

5. IS THERE BASIS FOR THE ASSERTION THAT "NO MERIT" EXISTED IN THE SARET-COOK UNDERLYING ACTION ?